Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	**WC Docket No. 17-108**
	)	

COMMENTS OF ITTA – THE VOICE OF AMERICA'S BROADBAND PROVIDERS

ITTA – The Voice of America's Broadband Providers (ITTA) hereby submits its comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[1] ITTA supports the *NPRM*'s proposal to reinstate the information service classification of broadband Internet access service (BIAS). ITTA also urges the Commission to apply equally to both mobile and fixed providers any Internet openness rules it keeps or modifies. In addition, ITTA believes that the no-blocking and no-throttling rules adopted in the *Title II Order*[2] are unnecessary and should be jettisoned, and the Commission should not adopt a no-paid prioritization rule at this time.

I. ANY INTERNET OPENNESS RULES THE COMMISSION RETAINS OR MODIFIES SHOULD APPLY EQUALLY TO BOTH MOBILE AND FIXED PROVIDERS

One thing the *Title II Order* got right was to apply the Internet openness rules equally to both mobile and fixed BIAS. To the extent the Commission keeps or modifies any of the previously-adopted Internet openness rules, it seeks comment on whether mobile broadband

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[1] *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017) (*NPRM*).

[2] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

should be treated differently from fixed broadband.[3] ITTA maintains that any Internet openness rules the Commission retains or modifies should apply equally to all broadband providers, regardless of the technology used to deliver BIAS.

There is no principled basis for treating fixed and mobile broadband providers differently. With the Commission's goal of safeguarding consumers' ability to access and effectively use the lawful content, applications, services, and devices of their choice on the Internet,[4] it follows that the rules the Commission adopts to achieve that goal should apply to all ISPs. This goal will be diminished if the "rules of the road" vary based on the technology used to gain access to the Internet. While the characteristics of mobile broadband networks may necessitate network management practices that would not be necessary in most fixed networks, the Commission's definition of reasonable network management should remain flexible enough to allow for such differences. There is one Internet, and it should remain open for consumers and innovators alike, regardless of whether it may accessed through different technologies and services.

II. THE NO-BLOCKING AND NO-THROTTLING RULES ADOPTED IN THE *TITLE II ORDER* ARE UNNECESSARY

The no-blocking rule prohibits ISPs from blocking competitors' content by mandating that a customer has a right to access lawful content, applications, services, and to use non-harmful devices, subject to reasonable network management. The no-throttling rule mirrors the no-blocking rule and bans the impairment or degradation of lawful Internet traffic or use of a non-harmful device, subject to reasonable network management practices.[5] The *NPRM* seeks

[3] *See NPRM*, 32 FCC Rcd at 4465, para. 95.

[4] *See, e.g., id.* at 4458, para. 71 (expressing goal of restoring the four "Internet Freedoms").

[5] *See id.* at 4461, paras. 81, 83.

comment on whether there is a continuing need for the no-blocking rule in order to protect "the freedom to send and receive lawful content and to use and provide applications and services without fear of blocking."[6] Similarly, it seeks comment on whether the no-throttling rule is still necessary.[7]

The Commission emphasizes that it opposes blocking lawful material.[8] ITTA wholeheartedly supports this view. However, while ITTA does not oppose the no-blocking and no-throttling rules, it does not believe they are necessary. ITTA members endorse the four "Internet Freedoms" and will not block or throttle in contravention of them. As the *NPRM* observes, prior to the *Title II Order*, many ISPs voluntarily abided by the 2010 no-blocking rule in the absence of a regulatory obligation to do so.[9] There is no reason to think ISPs will behave differently going forward if the Commission were to eliminate these rules.

III. THE COMMISSION SHOULD NOT ADOPT A RULE BANNING PAID PRIORITIZATION AT THIS TIME

In the *Title II Order*, the Commission imposed a flat ban on paid prioritization. The *NPRM* seeks comment on the continued need for such a rule and the Commission's authority to retain it.[10]

Under the Commission's proposed reclassification of BIAS as an information service, there is no legal basis for the Commission to prohibit ISPs from entering into paid prioritization agreements with edge providers. Such action would constitute impermissible common carrier

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[6] *Id.* at para. 80 (citations omitted).

[7] *See id.* at para. 83.

[8] *See id.* at para. 80.

[9] *See id.* (citing *Title II Order*, 30 FCC Rcd at 5648, para. 112 & n.248).

[10] *See id.* at 4462, para. 85.

regulation of information services.[11] Because the very premise underlying the *Title II Order* was that BIAS is a telecommunications service, the Commission did not attempt to specifically find legal authority to adopt a paid prioritization ban in any other provision of the Act independent of Title II.[12] Nor could it.[13] With BIAS classified as an information service, there simply is no legal path that would permit the Commission to ban paid prioritization or other arrangements for preferential access between edge providers and ISPs.[14]

The *Title II Order* recited a hyperbolic parade of horribles that it alleged would result from anything short of a flat ban on paid prioritization. "[T]he threat of harm is overwhelming";[15] "given the dangers, there is no room for a blanket exception for instances where consumer permission is buried in a service plan—the threats of consumer deception and

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[11] *Cf. Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5609, para. 138 (2014) (*Open Internet NPRM*) (emphasizing that Section 706 of the Telecommunications Act of 1996 "could not be used" to institute a flat ban on paid prioritization without running afoul of the prohibition in the Communications Act of 1934, as amended (Act) on the imposition of common carriage obligations on information services). The *NPRM* suggests that the authority to base any rules the Commission adopts in this proceeding on Section 706 is dubious in any event. *See NPRM*, 32 FCC Rcd at 4466, para. 101 (the text of Section 706 "appears more naturally read as hortatory, particularly given the lack of any express grant of rulemaking authority, authority to prescribe or proscribe the conduct of any party, or to enforce compliance").

[12] *See Title II Order*, 30 FCC Rcd at 5726, para. 288 (given classification therein of BIAS as a telecommunications service, the court's rationale in *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) for vacating the Commission's 2010 conduct rules "no longer applies and . . . we have legal justification to support our bright-line rules under section 706"); *id.* at 5728, para. 292 (adopting the paid prioritization ban "pursuant to sections 201(b) and 706").

[13] *See supra* note 11 (citing *Open Internet NPRM*, 29 FCC Rcd at 5609, para. 138).

[14] Even if the Commission does not ultimately reclassify BIAS as an information service, ITTA continues to maintain the Commission also does not possess authority to impose a flat ban on paid prioritization under Title II. *See* Comments of ITTA, GN Docket No. 14-28, at 2 (July 15, 2014); *see also Title II Order*, 30 FCC Rcd at 5943, Dissenting Statement of Commissioner Ajit Pai at n.148.

[15] *Title II Order*, 30 FCC Rcd at 5608, para. 19.

confusion are simply too great";[16] "paid prioritization network practices harm consumers, competition, and innovation, as well as create disincentives to promote broadband deployment";[17] "[a]s several commenters observe, allowing for the purchase of priority treatment can lead to degraded performance . . . in aggregate, lower bandwidth—for traffic that is not covered by such an arrangement."[18]

What is striking about this account is that it failed to quantify the predicted harms; instead, the *Title II Order* resorted to merely stating that "there is no practical means" to measure the extent to which edge innovation and investment would be chilled.[19] Nowhere was there any explanation of how paid prioritization would "create disincentives to promote broadband deployment"[20] other than the grasping claim that prohibiting paid prioritization will help foster broadband deployment "by setting clear boundaries of acceptable and unacceptable behavior",[21] a contention that just as easily could apply to permitting paid prioritization.

Moreover, other than conceding in a footnote that paid prioritization could improve the provision of telemedicine services,[22] nowhere was there any discussion of how paid prioritization could benefit consumers. And nowhere was there any technical analysis of some commenters' observations that paid prioritization would compromise network performance for users of non-

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[16] *Id.*

[17] *Id.* at 5653, para. 125.

[18] *Id.* at 5654, para. 126 (citations omitted).

[19] *Id.* at 5608, para. 19.

[20] *Id.* at 5653, para. 125.

[21] *Id.* at 5657, para. 129.

[22] *See id.* at 5658, para. 132 n.315.

prioritized service. Rather, it was asserted as a given.[23]

Further, nowhere in the *Title II Order* was there an acknowledgement of the fact that edge providers profit from the infrastructure investment of ISPs. In this regard, a flat ban on paid prioritization could harm consumers. Rather than passing through costs to consumers of bandwidth intensive edge providers, such as video content providers, the costs of supporting a network capable of handling the bandwidth demands of such services are borne by all broadband subscribers, regardless of their individual bandwidth usage.

The benefits paid prioritization arrangements can have for consumers should not be ignored. It is routine for entities that do business over the Internet to pay for a variety of services to provide an optimal user experience for their customers.[24] Companies have been doing so for years without disturbing the thriving Internet ecosystem, proving that concerns that paid prioritization degrades service for other users and relegates them to a so-called "slow lane" are unfounded.[25]

IV. CONCLUSION

For the foregoing reasons, once the Commission reinstates the information service classification of BIAS, which it should do, it should apply any Internet openness rules it keeps or

[23] *See id.* at 5654, para. 126 & n.287 (citing two commenters for the proposition that paid prioritization is "inherently" a zero-sum practice that relegates non-prioritized users to "best efforts" services, and two commenters for the proposition that it is not zero-sum insofar as broadband providers' capacity is not static).

[24] *See Open Internet NPRM*, 29 FCC Rcd at 5659, Dissenting Statement of Commissioner Michael O'Rielly.

[25] *See id.*

modifies in a technologically neutral manner. It should also remove unnecessary no-blocking and no-throttling rules, as well as the ban on paid prioritization.

Respectfully submitted,

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